

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs November 20, 2008

**PAUL O. DICKENS v. STATE OF TENNESSEE**

**Direct Appeal from the Circuit Court for Rutherford County**  
**No. 59208 James K. Clayton, Jr., Judge**

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**No. M2008-01075-CCA-R3-PC - Filed April 28, 2009**

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The petitioner, Paul Dickens, appeals the Rutherford County Circuit Court's denial of his petition for post-conviction relief. The petitioner was convicted of attempted voluntary manslaughter (a Class D felony), reckless endangerment (a Class E felony), and two counts of coercion of a witness (a Class D felony). He was subsequently sentenced to an effective term of twenty-eight years in the Department of Correction. In this appeal, the petitioner asserts that he was denied the effective assistance of counsel at trial based upon (1) trial counsel's action of proceeding to call the petitioner as a witness at trial knowing that the petitioner had not received his medication for panic attacks and (2) trial counsel's failure to move to sever the two counts of coercion of a witness. He also raises as an issue whether the trial court erred in ruling that his amendment to his post-conviction petition failed to comply with Tennessee Code Annotated section 40-30-106(d). Following review of the record, we find no reversible error and affirm the denial of post-conviction relief.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which DAVID H. WELLES and NORMA MCGEE OGLE, JJ., joined.

Guy R. Dotson, Jr., Murfreesboro, Tennessee, for the appellant, Paul O. Dickens.

Robert E. Cooper, Jr., Attorney General and Reporter; Matthew Bryant Haskell, Assistant Attorney General; William C. Whitesell, Jr., District Attorney General; and Trevor H. Lynch, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**Factual Background**

The underlying facts of the case, as recited on direct appeal, are as follows:

At trial, Detective Phillip Loyd testified that he was employed with the Murfreesboro Police Department and that he was called to investigate the subject incident after a 911 call reported shots fired at the location. Upon arrival, he spoke with and took statements from the victim, Richard (Rick) Robinson; the victim's wife, Melinda Robinson; Angela Neal; and Matthew Neal. Detective Loyd stated that the victim showed him where gunfire struck the garage and a metal gate behind the house. He also noticed tire tracks in the ground, where it appeared that someone had "spun out." Detective Loyd photographed the area and developed a crime scene sketch the following day. He further noted that he did not find any shell casings or buckshot upon a search of the area.

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Angela Neal, the victim's sister, testified that she and her husband went to visit the victim and his wife at 1208 Grantland Avenue in July 2003, in order to pay a debt of money owed by them to the victim. She stated that when they arrived, the defendant, whom they had known for ten years, was in an argument with the victim regarding their dogs. Mrs. Neal stated that the two men exchanged words and that the defendant went to his car and retrieved a gun from the trunk, stating that he would "just kill everyone." When the defendant began loading the gun, Mrs. Neal took her nephew (the victim's son), who was standing outside on the deck, inside the house. She stated that she then heard two shots and that the victim's wife, who was also in the house, phoned 911. When Mrs. Neal looked outside, the defendant was attempting to back out of the driveway but was blocked in by a vehicle owned by the victim's wife. The defendant yelled for someone to move the truck but when no one came outside, the defendant drove through the yard and left.

On cross-examination, Mrs. Neal . . . testified that she could see the defendant through the window and the storm door in the back of the house. She indicated that, before the shots were fired, the defendant was making threatening statements to the victim, which the victim was ignoring. Mrs. Neal stated that after the defendant backed out of the driveway, he heard sirens; pulled back into the driveway; yelled to the victim's wife, "I know you called the police, you stupid bitch;" and then left. Mrs. Neal admitted that the defendant did not attempt to come inside the house or get out of his car again.

Matthew Neal, the victim's brother-in-law, testified that he and his wife went to the victim's home in July 2003. He stated that when they arrived they saw the defendant and the victim arguing about a dog fight and that they heard the defendant threatening to kill the victim. The defendant then opened the trunk of his vehicle and retrieved a shotgun that was between eighteen and twenty-four inches in length. At that point, Mr. Neal got in his vehicle and backed out of the driveway as the defendant fired one shot. When he saw the victim running between two houses, he

stopped and picked him up, and they drove down the street and made a loop before returning to the house.

On cross-examination, Mr. Neal testified that the defendant was standing in front of the garage when he shot. Mr. Neal stated that when he started his car, the radio was turned off and all four windows were down. He further stated that he heard one shot and that the victim sustained no injuries. On redirect examination, he recalled that before retrieving his gun, the defendant said, "Everybody is going to die."

The victim's wife, Melinda Robinson, testified that her mother lived next door on Grantland Avenue and that Angela and Matthew Neal and the defendant were present at her home in July 2003 when she and her daughter came home. She stated that as she exited the vehicle, she heard the defendant threatening to kill the victim and indicating that he was going to get a gun.

Mrs. Robinson testified that she and her daughter immediately went inside the house and that she saw the defendant shoot at the victim. She stated that her four children and Mrs. Neal were also inside the house when the gun was fired and that she subsequently phoned 911 to report the incident. Mrs. Robinson testified that the defendant made several attempts to leave before he was successful and, when he got to the end of the driveway, he stopped, yelled toward the house, got back in the vehicle, and left. Finally, she identified the voices of the defendant; the defendant's ex-girlfriend, Francine Wright; Wendell Webb, a friend of the defendant; and the victim on recorded phone conversations between the parties.

On cross-examination, Mrs. Robinson testified that she saw the defendant load one shell into the gun and shoot once at the victim but acknowledged that she did not know where the victim was when the gun was fired. She further admitted that neither Francine Wright nor Wendell Webb was present at the time of the incident. Mrs. Robinson acknowledged that the defendant's only statement to her regarding her testimony was made when she was listening in on a conversation between the defendant and her mother. On redirect examination, she testified that the defendant's statements to her on the phone indicated that "when [the defendant] did get out [of prison], that he was going to do something."

The victim, Richard Robinson, testified that the defendant came to Grantland Avenue in July 2003 to leave his dog at the defendant's grandmother's house, which was next door to the victim's home. The victim stated that he was in the yard with his youngest son when the defendant arrived and that shortly thereafter, he heard his dog fighting with the defendant's dog and went around the fence to separate them. The defendant said "a few cuss words" as the victim retrieved his dog, and the victim told the defendant that he "[didn't] appreciate [the defendant] coming up here and

doing that,” in apparent reference to the defendant’s dog attack. The defendant, in turn, said that “he didn’t do it, that he had had a bad day and he would kick [the victim’s] ass, and [] said he would shoot [the victim].” During this time, Angela and Matthew Neal arrived at the house, as did the victim’s wife and daughter.

The defendant walked to his vehicle, and Matthew Neal yelled “gun” and began backing out of the driveway in his vehicle. The victim saw the defendant retrieve the shotgun from his trunk and ran as the defendant fired the weapon. The victim testified that he ran around the neighbor’s house and onto the street where he met Matthew Neal and got into the vehicle with him. He indicated that he did not see the defendant after he fired the gun but that he believed the defendant was firing at him because he hit the gate and wall near where the victim had been standing. The victim stated that he received a phone call from the defendant after the incident and that he was reluctant to testify because he “know[s] what kind of person [the defendant] is, [and] what he’s capable of doing.”

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The victim acknowledged that he had only one phone conversation with the defendant after the incident and that the defendant did not threaten him during that conversation. He admitted that he heard the remaining conversations for the first time at the district attorney’s office.

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The defendant testified that he went to his mother’s house on the day of the incident to leave his dog for a few days. He stated what when he let his dog out of the vehicle, the victim’s dog attacked his dog. He further indicated that he attempted to get between the two dogs, both originally bred for fighting, and that he was able to separate them after about “a minute and a half.” The defendant stated that he saw the victim standing in the backyard, told the victim to “leave [him] alone,” and proceeded to chain his dog and walk back to the car to unload dog food from the trunk. He recalled that words were exchanged between him and the victim, that an argument ensued, and that he went to his vehicle to get his shotgun because he thought the victim “was going to come around and jump on [him].” He stated that the victim’s wife shouted that he had a gun and went inside the house, as the victim ran around the north end of the house.

The defendant indicated that he shot birdshot at the garage after the victim had gone around the corner of the house and that he put the shotgun back in the trunk and attempted to leave thereafter. After realizing that his vehicle was blocked in by the victim’s wife’s truck, the defendant cut through the yard and came out onto the street.

The defendant identified the voices on the recorded phone conversations as Francine Wright, Wendell Webb, the victim, and his mother. He acknowledged that the threat he asked his mother to convey “[didn’t] sound good” but stated that it is a “figure of speech meaning that you’re really mad.” He further stated that when he stated that he would “shoot all of them” when he got out, he was “just upset,” and further testified that he “say[s] things when [he is] upset that don’t mean a hill of beans.” The defendant testified that when he spoke with the victim he was trying to get him to “tell the truth.” He indicated that his intent in firing the gun “was to scare [the victim] so he wouldn’t come around the house and jump on [him] or get in a fight.” The defendant further recalled that he did not point or fire the gun at anyone in particular. He admitted that the shotgun “got thrown away” after the incident. Finally, he acknowledged prior convictions for theft over \$500, burglary, third degree burglary, non-habitation burglary, theft under \$500, and criminal impersonation.

*State v. Paul O. Dickens, Sr.*, No. M2005-00571-CCA-R3-CD (Tenn. Crim. App., at Nashville, Feb. 15, 2006). Following a jury trial, the defendant was convicted of attempted voluntary manslaughter, reckless endangerment, and two counts of coercion of a witness. He was subsequently sentenced to an effective sentence of twenty-eight years in the Department of Correction. The petitioner filed a direct appeal to this court alleging insufficient evidence and a violation of double jeopardy. A panel of this court affirmed the conviction. *Id.*

The petitioner later filed a *pro se* petition for post-conviction relief alleging, among other grounds, that he was denied his Sixth Amendment right to the effective assistance of counsel. Following the appointment of counsel, an amended petition was filed. A hearing was later held at which the petitioner and trial counsel testified. Trial counsel testified that he was appointed to represent the petitioner and that they met on many occasions to prepare the defense of the case. Trial counsel stated that he reviewed all discovery with the petitioner, discussed the facts of the case with him, and hired an investigator.

Trial counsel further testified that he spoke specifically with the petitioner regarding his right to testify and made it clear to the petitioner that the decision was his. Trial counsel prepared the petitioner to testify, if he, in fact, chose to do so. He informed the petitioner that if he took the stand in his own defense, the State would attempt to make him lose his temper and would probably ask about his prior criminal history. Trial counsel specifically discussed how the petitioner should present himself if he chose to testify. The petitioner did, in fact, testify, and the State was able to upset him after which he swore, shouted, and banged his fists on the witness stand. However, the petitioner regained his composure and continued his testimony.

Trial counsel testified that he chose to focus on the petitioner’s intent at the time of the shooting. He stated that the defense was that the petitioner’s only intention was to scare the victim. However, he discouraged the petitioner from testifying as to how good a shot he was and that, if he had intended to actually shoot the victim, he could have done so. Trial counsel testified that he

thought he made good points during the State's proof, and the jury found the petitioner guilty of lesser included offenses.

Trial counsel stated that he did not recall being aware that the petitioner was on medication at the time of trial nor did he recall a discussion about any missed medication on the second day of trial. However, he testified that he would not have proceeded to trial if he believed the petitioner was in need of medication.

As post-conviction counsel began questioning trial counsel with regard to the severance issue, the State lodged an objection upon grounds that there was no factual basis for the claim in the amended petition. The post-conviction court ruled that the petitioner could not proceed on that ground. However, an offer of proof was presented. During the offer of proof, trial counsel testified that he did not recall discussing possible severance of the offenses with the petitioner, as he felt that the charges were all interrelated. Moreover, he stated that he felt the recorded phone calls at issue in the coercion charges were helpful to the petitioner with regard to the attempted murder charges. According to trial counsel, he believed that the phone calls demonstrated a lack of the required intent for the attempted murder. Trial counsel stated that he wanted the four charges tried together as a matter of strategy to aid the defense. He also testified that he felt the evidence in each case was likely to be admissible in each case, if tried separately.

The petitioner testified and stated that he had spoken with trial counsel twice at the jail and perhaps three to four times during court appearances. According to the petitioner, trial counsel advised him that he should not testify, but he testified that he did not make the decision until after the trial began. He testified that he decided to testify despite trial counsel's advice because he felt the State had put on so much evidence against him that there was "nothing for" him and because the prosecutor upset him by looking at him in an offensive manner "when nobody was paying attention." The petitioner also testified that he wanted to have a separate trial for the coercion charges rather than having all the charges tried together. He was unable to recall if he and trial counsel had worked out a defense strategy, but he did recall discussing the facts of the case with trial counsel.

Shortly before trial, the petitioner began taking Prozac for panic and anxiety attacks. He testified that he was not given his medication on the day he testified at trial, which was his fourth day on the medication. He stated that he informed both trial counsel and the trial court that he had not taken the medicine. However, trial counsel had no recollection of the conversation, and the transcript does not indicate that the trial court was informed. Nonetheless, according to the petitioner, because he missed his daily dosage, he had a panic attack while on the stand, which contributed to his outburst during cross-examination. A medical record was entered which stated that the transport officer had been informed about the missed dose and was advised that the petitioner should be fine without the medication until his return to the jail.

After hearing the evidence presented, the post-conviction court denied the petition by written order. The petitioner now timely appeals the denial.

## Analysis

On appeal, the petitioner asserts that the post-conviction court erred in concluding that he was not denied his Sixth Amendment right to the effective assistance of counsel, specifically contending that trial counsel was ineffective by: (1) proceeding to trial and calling the petitioner as a witness after he had been informed that the petitioner did not receive his medication for panic attacks; and (2) failing to move for severance of the coercion of a witness counts. He further contends that the post-conviction court erred in its determination that the petitioner's amendment to his post-conviction petition regarding the severance issue did not comply with Tennessee Code Annotated section 40-30-106(d).

A court may grant post-conviction relief when the conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States. T.C.A. § 40-30-103 (2006); *Vaughn v. State*, 202 S.W.3d 106, 115 (Tenn. 2006); *Howell v. State*, 151 S.W.3d 450, 460 (Tenn. 2004). In order to be granted relief, a defendant must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. T.C.A. § 40-30-110(f) (2006); *Wiley v. State*, 183 S.W.3d 317, 325 (Tenn. 2006). It is well-settled that the abridgement of the right to effective assistance of counsel is a proper ground for post-conviction relief. *Vaughn*, 202 S.W.3d at 115; *Dean v. State*, 59 S.W.3d 663, 667 (Tenn. 2001).

The overall standard for evaluating a claim of ineffective assistance of counsel is “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Vaughn*, 202 S.W.3d at 116. To succeed on a challenge of ineffective assistance of counsel, the petitioner bears the burden of establishing the allegations set forth in his petition by clear and convincing evidence. T.C.A. § 40-30-110(f) (2006). The petitioner must demonstrate that counsel’s representation fell below the range of competence demanded of attorneys in criminal cases. *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). Under *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), the petitioner must establish (1) deficient performance and (2) prejudice resulting from the deficiency. In order to demonstrate prejudice, the petitioner must show that there was a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. The petitioner is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy, and cannot criticize a sound, but unsuccessful, tactical decision made during the course of the proceedings. *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). This deference to the tactical decisions of trial counsel is dependent upon a showing that the decisions were made after adequate preparation. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992). Because a petitioner must establish both prongs of the test, a failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the ineffective assistance of counsel claim. *Id.* at 697, 104 S. Ct. at 2069.

The issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact. *Burns*, 6 S.W.3d at 461. “[A] trial court’s *findings of fact*

underlying a claim of ineffective assistance of counsel are reviewed on appeal under a *de novo* standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise.” *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001) (citing Tenn. R. App. P. 13(d); *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997)). This court may not reweigh or re-evaluate the evidence, nor substitute its inferences for those drawn by the post-conviction court. *Id.*; see also *State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001). All questions concerning the credibility of the witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. *Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999). However, *conclusions of law*, are reviewed under a purely *de novo* standard with no presumption that the post-conviction court’s findings are correct. *Id.*

Initially, we address the petitioner’s claim that the trial court erred in ruling that the amendment to his post-conviction petition failed to comply with the statute. In his amended petition, the petitioner asserted that “[t]he additional grounds for post-conviction relief are as follows:

1. Petitioner’s trial counsel failed to file a pre-trial motion pursuant to Tennessee Rules of Criminal Procedure, Rule 14 to sever Counts one (1) and two (2) of the indictment from counts three (3) and four (4).
2. Petitioner’s trial counsel failed to preserve the issue of severance of the counts of the indictment for appellate review.
3. Petitioner was denied effective assistance of counsel.

Tennessee Code Annotated section 40-30-106(d) (2006) provides:

The petition must contain a clear and specific statement of all grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings. Failure to state a factual basis for the grounds alleged shall result in immediate dismissal of the petition. If, however, the petition was filed pro se, the judge may enter an order stating that the petitioner must file an amended petition that complies with this section within fifteen (15) days or the petition will be dismissed.

We agree with the petitioner that the allegation as set forth in the amended petition is sufficient. While it does appear in the transcript that the post-conviction court ruled otherwise, an offer of proof was made with regard to the issue. Additionally, the post-conviction court, in its order of denial, appears to have ruled upon the issue. As such, any error is not reversible.

In its written order denying relief, the post-conviction court made the following findings:

At the trial on this matter[, the petitioner] was represented by [trial counsel] from the public defender’s office. [Trial counsel] has 18 years’ experience as an



assistant public defender. And [trial counsel] spoke with [the State] and received discovery package from [the State]. He also spoke with the victim who was [the petitioner's] brother-in-law and was fearful of [the petitioner] and wanted him prosecuted to the fullest extent of the law.

The public defender's investigator . . . spoke with witnesses also and discovered and discussed with [the petitioner] his testifying in how to demean himself should he testify.

[The petitioner] was proud of his marksmanship. [The petitioner] claimed that he did not try to shoot his brother-in-law. [The petitioner] further testified at the trial, and [he] used the Lord's name in vain during his cross-examination by [the State] and lost his cool at that point. Otherwise he controlled himself fairly well. That did have a bearing I think on his credibility, however.

And [the petitioner] made a number of calls from the jail which were recorded and played for the jury. As a result of [the petitioner's] testimony severance would not have been proper and that was a trial strategy.

[The petitioner] was not a credible witness . . .

#### **I. Medication/Calling Petitioner as a Witness**

First, the petitioner contends that the post-conviction court erred in concluding that trial counsel was not ineffective, "when counsel received notice that Petitioner did not receive his medication for panic [attacks] and proceeded to trial and to call Petitioner as a witness." According to the petitioner, he "needed the medication to better control himself," he was denied this medication and advised trial counsel that he had not received it. He further asserts that because of the lack of medication, he had a panic attack on the witness stand, which resulted in his getting upset, banging the witness stand, and cursing. He claims that "the failure to receive needed medication precluded [him] from effectively assist[ing] in his defense."

We find nothing to preponderate against the post-conviction court's findings with regard to this claim. Trial counsel gave specific testimony that he was not aware that the petitioner needed medication and that the petitioner appeared to be in control of his faculties. Though the petitioner gave contrary testimony, specifically that he had informed trial counsel that he had not received his medication, the post-conviction court found that the petitioner was not a credible witness. It is not the province of this court to reweigh or reevaluate determinations of credibility. Moreover, we would further note that while the record does establish that the petitioner informed the transport officer that he had not received his medication that day and that the jail staff was informed, the exhibit introduced stated that the petitioner would be fine without the medication until he was returned to the jail. Thus, the petitioner is not entitled to relief on this ground.

## II. Severance

Next, the petitioner contends that the court erred in ruling that he received the effective assistance of counsel when trial counsel failed to file a motion to sever the two coercion of a witness charges. Again, we find nothing to preponderate against the post-conviction court's findings that trial counsel was not deficient. Trial counsel testified that he did not remember discussing the possibility of severing the cases and, further, that he felt like the recorded phone conversations used to establish the coercion charges actually helped the petitioner's case with regard to the other charges. He stated that, as a matter of trial strategy, he wanted the conversations admitted into evidence. Based upon his belief that the calls were helpful to the more serious charges and that he believed the evidence of the other crimes would be at least partially admissible in both cases, we, like the post-conviction court, conclude that it was a valid trial strategy which trial counsel pursued after adequate research.

Moreover, the petitioner has failed to establish the prejudice prong, as he failed to establish that his motion to sever would have been granted. In order to deny a motion to sever offenses, the trial court must find: (1) a common scheme or plan; and (2) that the evidence of one would be admissible in the trial of others. Tenn. R. Crim. P. 14(b)(1). It has been held by this court that coercion of a witness may be part of a common scheme or plan to avoid prosecution or conviction for the joined offense. *State v. Larry D. LaForce, II*, No. E2007-00334-CCA-R3-CD (Tenn. Crim. App., at Knoxville, Feb. 27, 2008). Moreover, to show that evidence of one offense would be admissible in the trial of the other if the offenses remain severed, the trial court must conclude that: (1) the evidence of each offense is relevant to some material issue in the trial of the other offense; and (2) that the probative value of the evidence of the other offense is not outweighed by the prejudicial consequences of admission. *State v. Osborne*, 251 S.W.3d 1, 12 (Tenn. Crim. App. 2007).

As noted, trial counsel testified that he believed that, had the cases been severed, the evidence of the separate offenses would have likely been admissible as evidence in the trial of the other offenses. We agree that the statements made during the phone calls specifically related to the shooting and would have been part of the State's proof in that case. Moreover, evidence presented in the shooting case would likely have been admitted in a trial for coercion to show the basis for the coercive phone calls. Likewise, the petitioner failed to establish that the probative value of the evidence would have been outweighed by the prejudice. Finally, the post-conviction court, who was also the trial court in this case, stated on the record that any motion to sever would have been denied. Accordingly, we must conclude that the petitioner has failed to establish his entitlement to relief on this ground.

## **CONCLUSION**

Based upon the foregoing, the decision of the Rutherford County Circuit Court denying post-conviction relief is affirmed.

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JOHN EVERETT WILLIAMS, JUDGE